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No. 07-906

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SUPREME COURT, U.S.

In The Supreme Court of the United States

ROHM AND HAAS PENSION PLAN,

Petitioner,

v.

GARY WILLIAMS, Individually and on Behalf of Others Similarly Situated,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the automatic cost-of-living adjustment ("COLA") provided to participants in the Rohm and Haas Pension Plan is an accrued benefit that cannot be retroactively eliminated or reduced and which, discounted to present value, must be included in a lump-sum payment of the accrued benefit.

PARTIES TO THE PROCEEDING

The Petition fails to describe the plaintiff class represented by respondent Williams. Pursuant to the parties' stipulation and the District Court's order, the class is defined as "[a]ll participants in the Rohm and Haas Pension Plan (the "Plan") who received a lump sum distribution from the Plan which did not take into account a cost of living adjustment in calculating the lump sum distribution." The parties estimate that the class consists of over 4,000 Plan participants.

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COUNTERSTATEMENT

1. The Seventh Circuit held that an automatic cost-of-living adjustment ("COLA") that a plan promises to participants is an "accrued benefit" that cannot be retroactively eliminated or reduced. The Court of Appeals based its decision on the provisions of the Rohm and Haas Pension Plan ("Plan") and its holding in *Hickey v. Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 980 F.2d 465, 468 (7th Cir. 1992), that a plan cannot draft around the protections of accrued benefits provided by the Employee Retirement Income Security Act ("ERISA").

The Plan admits, as it must, that any alternative form of benefit payment, such as the lump sums in this case, must provide a dollar amount actuarially equivalent to a participant's accrued benefit.[1] Participants cannot be required to forfeit a portion of their accrued benefit as the price of receiving an alternative form of benefit payment such as a lump sum.[2] The Plan does not dispute that if the COLA is part of participants' accrued benefit its value must be included in lump-sum distributions. The Plan also concedes that the lump sums it paid to respondent Williams and the members of the class he represents

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[1] Actuarial equivalency is required by ERISA Section 204(c)(3), 29 U.S.C. § 1054(c)(3), and Treasury Regulation 1.417(e)-1(d), 26 C.F.R. § 1.417(e)-1(d). *See Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 759 (7th Cir. 2003); *Esden v. Bank of Boston*, 229 F.3d 154, 163-165 (2d Cir. 2000).

[2] *See Berger*, 338 F.3d at 762-763; *Esden*, 229 F.3d at 173; 29 U.S.C. § 1053(a); 26 U.S.C. § 411(a); 26 C.F.R. § 1.411(a)-4.

did not include the COLA's present value and were not actuarially equal to the retirement annuities participants would have received had they not elected lump sums.

2. The Plan tries to capture the Court's attention by misrepresenting that the Seventh Circuit "expressly declined" to look at the pertinent Plan provisions and adopted a "*per se*" rule that "if provided to a participant, a COLA is *always* part of every participant's 'accrued benefit' – regardless of the terms of the plan. . . ." (Pet. 13, 14 n. 4; emphasis in original.) The Seventh Circuit did no such thing. Both the 1994 and 2001 versions of the Plan were in the record on appeal, the parties' briefs focused on the relevant provisions, and the Seventh Circuit's opinion relied upon the pertinent Plan provisions in holding that the COLA is an accrued benefit. (Pet. App. 2a-6a.)

The Plan further claims that under its terms the COLA is discretionary and can be eliminated at any time, even retroactively. The Plan's actual terms are indisputably to the contrary. The Petition ignores the controlling provisions. Both the 1994 Plan (§ 15.1; Pet. App. 59a) and the 2001 Plan (§ 10.1) state unequivocally that a participant "shall be entitled to an annual Cost-of-Living Adjustment . . . " of the basic

monthly annuity payment upon retiring.[3] Nothing in either version of the Plan gives the Plan discretion to remove the COLA retroactively with respect to participants who are already receiving monthly annuity payments or active workers who have earned the COLA increase in their future annuities by providing service to Rohm and Haas. Quite the opposite, the Plan – as ERISA requires – states that it cannot retroactively eliminate a benefit such as the COLA:

> The Company reserves the right to amend or discontinue the Plan at any time, *but no such action shall adversely affect current rights or benefits theretofore acquired or accrued by any Participant* . . . , except such changes if any, as may be required to permit the Plan to meet the requirements of sections 401 and 404 of the Internal Revenue Code, or the applicable provisions of any other statute or except as otherwise permitted by law.

1994 Plan § 22.1 (not included in the Petition Appendix; emphasis added). *See also* 2001 Plan § 16.1.[4]

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[3] The provisions of the Plan included in Appendix D to the Petition, pp. 44a-67a, are not from the 2001 Plan, as the Appendix states, but instead from the 1994 Plan.

[4] Rohm and Haas recently acknowledged that the COLA cannot be retroactively eliminated. In December 2007, Rohm and Haas issued a newsletter announcing changes in its retirement benefits including the prospective elimination of the COLA with respect to benefit accruals after December 31, 2008. *Retirement Benefits: Important Changes to the U.S. Retirement Program*, Rohm and Haas, Dec. 2007, at 5. However, Rohm and

(Continued on following page)

The Plan admits that it adopted the automatic COLA as an adjustment to participants' monthly pension annuity payments to protect participants against the erosion of their retirement benefits from inflation. Patricia Coyle, the Plan's Rule 30(b)(6) deposition designee and its director of corporate employee benefits and secretary to the Benefits Administrative Committee until she retired on December 31, 2004, testified that:

> My understanding of the COLA, it was in there because the distribution, normal distribution from the pension plan is an annuity benefit and there was protection against inflation. . . .

Coyle Dep. 5-6, 31.

Thus, the COLA is not a separate or discretionary benefit received by participants when they retire. It is an integral component of their accrued benefit. The COLA was part of the Plan for the entire period during which the class members provided service to Rohm and Haas. Consequently, they *earned* a contractual as well as statutory right to the COLA that cannot be taken away. ERISA allows only the prospective elimination of an accrued benefit. *See Central Laborers' Pension Fund v. Heinz*, 541 U.S. 739,

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Haas assured participants that "[t]his change has no effect on the benefit you earn through December 30, 2008. The amount you earn through that date, including the application of any COLA issued on monthly benefits paid after retirement, is protected and will not be reduced." *Id.*

743-747 (2004). Consequently, the actuarial value of the COLA must be included in participants' lump sums.

To support its contention that the COLA is discretionary, the Plan relies not on Plan provisions but instead statements in its 2002 Summary Plan Description ("SPD"). (Pet. 6; Pet. App. 68a-69a.) Neither the 1994 Plan nor the 2001 Plan contains a provision making the COLA a discretionary benefit. Indeed, a retroactive elimination of the COLA would violate both Plan Section 22.1, quoted above, and ERISA Section 204(g)(1), 29 U.S.C. § 1054(g)(1).[5] The Plan issued the 2002 SPD after learning of the decision in *Laurenzano v. Blue Cross & Blue Shield of Mass., Inc. Retirement Trust Plan*, 134 F. Supp. 2d 189, 199-201 (D. Mass. 2001), which held that, because an automatic COLA is an accrued benefit, its actuarial value must be included in lump-sum benefit distributions. As the Court of Appeals concluded, the 2002 SPD was intended to provide the Plan with a pretext for denying that the COLA is an accrued benefit and for excluding its actuarial value from lump sums. (Pet. 7a.) In any event, the 2002 SPD can have no legal effect on class members' benefits. It was issued 28

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[5] Section 204(g)(1) provides: "The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in [29 U.S.C. § 1082(c)(8) or 29 U.S.C. § 1441.]" The exceptions apply only to situations involving substantial business hardship and terminated plans with insufficient assets to pay all accrued benefits.

years after the COLA was first provided in March 1974 and after most class members had received their lump sums. The 2002 SPD specifically states that it has no substantive effect because the Plan's terms govern.[6] That is what ERISA requires: "When . . . the plan and the summary plan description conflict, the former governs, being more complete – the original, as it were, which the summary plan description excerpts and translates into language that may be imprecise because it is designed to be intelligible to lay persons. . . ." *Health Cost Controls of Ill. v. Washington*, 187 F.3d 703, 711 (7th Cir. 1999), *cert. denied*, 528 U.S. 1136 (2000).

Consequently, the Court of Appeals did not, as the Plan contends, mechanically apply a "per se" rule that all COLAs are accrued benefits. The Seventh Circuit properly examined the relevant Plan provisions, found that it promises participants a COLA that is automatically added to their monthly pension annuity payments, and properly held that, under the relevant facts and ERISA requirements, the COLA is

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[6] The Plan omitted the following paragraph of the 2002 SPD from Appendix E to its Petition (Pet. App. 68a-69a): "This Summary Plan Description ("SPD") is not meant to interpret, extend, or change the Plan in any way. This SPD is only a summary and does not cover all of the provisions and is not the official text of the Plan. . . . In the event of any inconsistency between the information in this SPD and the Plan itself, or to the degree that the Plan contains more complete or detailed information or rules, the Plan document will govern." 2002 SPD at p. 1.

part of each participant's accrued benefit and must be included in lump-sum distributions. (Pet. App. 5a-6a.)

REASONS FOR DENYING THE PETITION

I. THE PETITION IS DEFEATED BY THE PLAN'S ERRONEOUS FACTUAL CONTENTION THAT THE COLA IS DISCRETIONARY.

As explained in the Counterstatement, the indisputable facts defeat the Plan's contention that the COLA is a discretionary benefit that the Plan can permissibly exclude from lump sums. Both lower courts found the COLA to be an entitlement under the Plan's provisions and not discretionary (Pet. App. 3a, 15a), and the Plan contains no terms giving it discretion to retroactively eliminate the COLA from the participants' pension benefits. This Court's practice is to defer to the factual findings of the lower courts upon which their legal conclusions are based. *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996). Thus, plenary review by this Court would begin and end on a dispositive factual issue as to which there are no grounds for dispute. Review of such indisputable factual findings is plainly not a reason for exercising certiorari jurisdiction.

II. THE PLAN HAS IMPERMISSIBLY CHANGED ITS POSITION ON *HICKEY*.

In the Seventh Circuit, the Plan argued that *Hickey* had correctly held that the COLA provided by the plan in that case was an accrued benefit that could not be eliminated retroactively. (Initial Br. 20-22; Reply Br. 6-9, 13, 20-21.) The Plan attempted to distinguish *Hickey* from this case on the supposed ground that the terms of the *Hickey* plan explicitly provided that the COLA was an accrued benefit. The Plan persisted in viewing *Hickey* as correctly decided even in its Petition for Rehearing and Rehearing En Banc (pp. 1-2, 6-8). However, respondent Williams demonstrated, based on the record in *Hickey*, that there is no material difference between the Plan provisions in this case and the plan provisions in *Hickey*. (Br. of Plaintiffs-Appellees 17-19.) The plan in *Hickey* also purported to exclude the COLA from its definition of "accrued benefit" and contended that its definition should prevail. The Seventh Circuit rejected that argument and held that a plan cannot draft around ERISA's requirements. 980 F.2d at 468. The plan could not renege on its promise to provide the COLA merely because it had labeled the benefit as "supplementary" rather than "accrued." *Id.* Similarly here, the Plan cannot retract its promise to pay the COLA as part of participants' pensions merely by excluding the benefit from the Plan's own definition of "Accrued Benefit."

The Plan now changes tack and attacks *Hickey's* holding. The Plan contends that the Seventh Circuit's

decision in this case "perpetuated" *Hickey's* "erroneous statutory construction" of ERISA's definition of "accrued benefit." (Pet. 21.) A petitioner cannot advance an argument in this Court that it did not make below, much less make a 180-degree change in its position with respect to a controlling authority. *United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001). The Plan's intent is transparent. The factual question whether the terms of the Plan in this case are sufficiently similar to the plan's provisions in *Hickey* to come within its holding is hardly an issue meriting this Court's attention. However, the Plan is bound by its acceptance of *Hickey's* holding below, which in any event was clearly correct. The Plan's attempted change in position in this Court provides a second reason for denying the Petition.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ISSUE WHETHER AN AUTOMATIC COLA IS AN ACCRUED BENEFIT.

The Petition is premised on supposed conflicts between the Seventh Circuit's decision in this case and decisions by the Fourth and Ninth Circuits. There is no conflict whatsoever. To the contrary, those cases support the Seventh Circuit's decision.

The Plan cites *Board of Trustees of Sheet Metal Workers' Nat'l Pension Fund v. Commissioner of Internal Revenue*, 318 F.3d 599 (4th Cir. 2003), as holding that a COLA was not an accrued benefit as to certain participants. (Pet. 11-12.) However, the Plan

ultimately admits (Pet. 13-14 n.4), as the Court of Appeals fully explained (Pet. App. 7a), that the Fourth Circuit's holding was limited to participants who retired *before* the COLA was adopted and who therefore did not earn the COLA during their employment: "It was a gratuitous benefit provided to them after retirement which therefore could be withdrawn without impairing the promised benefit that had accrued at their retirement." 318 F.3d at 604. There was no dispute in *Sheet Metal Workers* that, as in this case, the COLA was an accrued benefit as to participants who retired *after* it was adopted in 1991 and who therefore earned it through their employment. The Fourth Circuit explicitly distinguished *Hickey* because it had not addressed "whether the benefit would have become an accrued benefit for retirees who were first given the benefit after separation from service by retirement." 318 F.3d at 605 n. 2.

The COLA provided to retirees in *San Diego AFL-CIO Bus Drivers Local Div. 1309 of the Amalgamated Transit Union v. San Diego Transit Corp.*, 1994 U.S. App. LEXIS 13167, at *13 (9th Cir. May 19, 1994), was expressly limited to a specific two-year period. Thus, participants had no continuing right to receive the COLA after the two-year period expired. *Hickey* was distinguished by the fact that, as in this case, the plan "promised a COLA to extend indefinitely into the future. . . . *Id.* at *13 n. 3.

An earlier Ninth Circuit decision cited in *San Diego AFL-CIO Bus Drivers*, *id.*, is in full accord with the Seventh Circuit's decision in this case. In *Shaw v.*

International Ass'n of Machinists & Aerospace Workers Pension Plan, 750 F.2d 1458 (9th Cir.), *cert. denied*, 471 U.S. 1137 (1985), the plan provided cost-of-living protection to retirees through a "living pension" feature that adjusted the salary component of the defined benefit formula to the current salary level of the position from which a participant had retired. The Ninth Circuit concluded that the living pension provision was an accrued benefit because it was not a separate benefit but instead modified the formula determining the pension payments beginning at normal retirement age. *Id.* at 1460, 1464-1465. It was also not an ancillary or early retirement benefit. *Id.* at 1463-1464. The Seventh Circuit in *Hickey* held that the Ninth Circuit's reasoning in *Shaw* applied fully to the COLA:

> The "living pension" feature was strikingly similar in principle to the COLA provision. Neither the "living pension" feature nor the COLA were included in the basic benefit formula. However, each operated upon that benefit formula to cause an adjustment to the retirement benefits.

980 F.2d at 469.

Thus the decisions of the Seventh, Fourth, and Ninth Circuits are perfectly consistent in holding that an automatic COLA earned by participants before retiring is an accrued benefit.

IV. THERE IS NO CONFLICT AMONG THE CIRCUITS ON WHETHER A PLAN CAN DRAFT AROUND ERISA'S PROTECTION OF "ACCRUED BENEFITS."

The Plan relies primarily upon its own definition of "Accrued Benefit," which does not refer to the COLA, to support its contention that the COLA is not an "accrued benefit" under ERISA. Contrary to the Plan's contention, the Circuits agree that ERISA controls which benefits are protected as accrued benefits, not a plan's self-serving provisions.

A. The Automatic COLA Entitlement Is an "Accrued Benefit."

The COLA has all the characteristics of an "accrued benefit," which ERISA defines as "the individual's accrued benefit determined under the plan and . . . expressed in the form of an annual benefit commencing at normal retirement age. . . ." 29 U.S.C. § 1002(23).

First, it accrues over time as the employee provides service to the employer. "[A]n employee's accrued benefit at any particular point in time is what a fully vested employee would be entitled to receive under the terms of the plan if employment ceased at that particular point in time." *Ashenbaugh v. Crucible Inc., 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1524 (3rd Cir. 1988), *cert denied*, 490 U.S. 1105 (1989); *see also Central Laborers' Pension Fund,* 541 U.S. at 743-747. It is not disputed that Williams and

each class member earned the COLA and was entitled to it when their employment with Rohm and Haas terminated.[7]

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[7] The Plan contends in a footnote (Pet. 21 n. 6) that the COLA could not be an accrued benefit because payment does not begin until months after the participant has retired, and therefore the COLA does not commence at normal retirement age as ERISA requires for an accrued benefit. This argument, which was not made below and is therefore waived, is frivolous. The Plan confuses entitlement to the COLA, which becomes effective upon the Plan's own terms upon retirement at normal retirement age, with the timing of payment after the participant has retired. 1994 Plan § 15.1 entitles each participant receiving a monthly annuity payment to begin receiving the COLA as of the March 31 subsequent to the year of retirement. However, the very next section, § 15.1.1, provides that the participant will be paid $^1/_{12}$ of the COLA "for each full month of retirement during the preceding calendar year." (Pet. App. 59a.) Thus, the participant receives a COLA payment for each month commencing at normal retirement age.

In the same footnote, the Plan erroneously argues (again for the first time) that early retirees' entitlement to the COLA under the Plan beginning at age 60 demonstrates that the COLA is not an accrued benefit. However, the fact that participants could have received the COLA even earlier is irrelevant to whether the COLA is an accrued benefit. Moreover, the case cited by the Plan – *American Stores Co. v. American Stores Co. Retirement Plan*, 928 F.2d 986, 987, 990 (10th Cir. 1991) – applied ERISA's anti-cutback rule, 29 U.S.C. § 1054(g), as it read *before* 1984 ERISA amendments that protect early retirement benefits as accrued benefits under the anti-cutback rule. Aggravating its misplaced reliance on this out-dated case, the Plan misstates the Tenth Circuit's holding. That Court did not hold that "unreduced early retirement benefits were not accrued benefits because they did not commence at normal retirement age" (Pet. 22 n. 6) but instead that "to the extent the early

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Second, the COLA increases the dollar amount of each participant's retirement annuity. Indeed, the COLA cannot be a benefit separate from that annuity, as the Plan suggests, because it is a percentage increase calculated from that normal benefit.

The Plan claims that the phrase "determined under the plan" in the ERISA definition of "accrued benefit" gives a plan a free hand in deciding whether a particular benefit is an "accrued benefit" or instead a gratuity that the Plan can eliminate, even retroactively, with impunity. But Congress expressly intended ERISA's definition of "accrued benefit" to prevent plans from evading the new statute's protections of workers' pension benefits:

> It is necessary to provide a *statutory* definition of an "accrued benefit," because, unless this is a defined amount, vesting of an "accrued benefit" in whatever form is specified by the plan has little, if any, meaning.

H.R. Report No. 807, 93d Cong., 2d Sess. 60, *reprinted in* 1974 U.S. Code Cong. & Admin. News 3670, 4726 (emphasis added).

The phrase "determined under the plan" allows each plan to select the monetary level of the benefit to be provided and to attach conditions to the benefit provided they comport with ERISA's requirements, but

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retirement benefits actuarially exceed the normal retirement benefits, the excess is not an accrued benefit. . . ." *Id.* at 990.

it does not permit the plan to exclude benefits from protection as "accrued benefits" if they satisfy ERISA's criteria for such protection. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511-512 (1981); *Nachman v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). As the Seventh Circuit correctly concluded in this case: "The Plan cannot avoid that which is dictated by the terms of ERISA." (Pet. App. 8a.) *See also Esden*, 229 F.3d at 172-173 (employers not required to provide pension benefits, but when they do, their plans must comply with ERISA's requirements).

B. There Is No Circuit Conflict Concerning the Determination of Accrued Benefits.

The cases cited by the Plan do not support its contention that there is a conflict among the Circuits on the question whether courts must defer to a plan's determination that the benefits it provides are not "accrued benefits" under ERISA. Just as the Seventh Circuit did in this case, these courts determined the participant's benefit entitlement by examining the plan's provisions in light of ERISA's requirements.

The Third Circuit in *Ashenbaugh*, for example, found that the benefits in question were early retirement benefits that had never vested because the conditions in the plan governing them had not been satisfied. The Court did not simply defer to the plan's position but instead determined that the benefits were not accrued benefits by applying ERISA's requirements. 854 F.2d

at 1523-1528. The same is true of *Hein v. FDIC*, 88 F.3d 210, 218 (3d Cir. 1996), which held that the participant had not satisfied the plan's conditions for certain early retirement benefits that were valid under ERISA.

De Nobel v. Vitro Corp., 885 F.2d 1180 (4th Cir. 1989), permitted lump-sum distributions that were not equivalent to subsidized early retirement annuities, but that is irrelevant here. If a plan, as in *De Nobel*, specifically so provides, the actuarial equivalence requirement may permissibly be limited to lump sums based on accrued benefits at normal retirement age, not subsidized early retirement benefits. That is why the IRS requires plans to provide a specific notice to participants that the subsidized portion of an early retirement annuity may be lost if the participant opts for an unsubsidized lump-sum distribution. *See* TD 9256, Revised Regulations Concerning Disclosure of Relative Values of Optional Forms of Benefit, 71 Fed. Reg. 14,798 (Mar. 24, 2006).

Although the Plan cites the Ninth Circuit's decision in *Shaw* as conflicting with the Seventh Circuit's decision in this case, *Shaw* is fully consistent with the decision below. *Shaw rejected* a plan's contention that a COLA-like provision was not an accrued benefit. 750 F.2d 1463-1465. *Hickey* cited *Shaw* in support of its holding that an automatic COLA is an accrued benefit. 980 F.2d 468-469.

C. The Automatic COLA Is Not a "Retirement-Type Subsidy."

Grasping to find some ERISA category for the COLA other than "accrued benefit," the Plan tries to "shoehorn" the COLA into the definition of "retirement-type subsidy." *Hickey* correctly held that once the COLA is found to be an accrued benefit, the retirement-type subsidy issue becomes irrelevant. *See Hickey*, 980 F.2d at 470. In any event, the COLA is not a "retirement-type subsidy" under ERISA and the governing Treasury Regulation, which the Plan ignores.

A retirement-type subsidy is a type of benefit, such as an early retirement benefit (the most common example) or a survivor's annuity, that is an *alternative* to the participant's pension benefit provided at normal retirement age and that is actuarially more valuable than the normal retirement benefit, with the excess value being the subsidy. *See, e.g., Ashenbaugh*, 854 F.2d at 1527-1528. The Tax Court has held that a COLA that increases pension benefits beginning at normal retirement age is not a retirement-type subsidy: "The concept of a retirement-type subsidy has an accepted meaning as it is used in section 411(d)(6)(B)(i). It does not refer to postretirement COLAs. It refers to amounts paid to early retirees above their normal pension benefits." *Board of Trustees of Sheet Metal Workers' Nat'l Pension Fund v. Commissioner of Internal Revenue*, 117 T.C. 220, 2001 U.S. Tax Ct. LEXIS 50 at *27 (Dec. 4, 2001), *aff'd*, 318 F.3d 599 (4th Cir. 2003).

A COLA is also not a "retirement-type subsidy" under the applicable Treasury Regulation, 26 C.F.R. § 1.411(d)-3(g)(6). The Regulation defines "retirement-type subsidy" as "the excess, if any, of the actuarial present value of a retirement-type benefit over the actuarial present value of the accrued benefit commencing at normal retirement age. . . ." The Regulation in turn defines "retirement-type benefit" as either "[t]he payment of a distribution alternative with respect to an accrued benefit" or "the payment of any other benefit under a defined benefit plan . . . that is permitted to be in a qualified pension plan, continues after retirement, and is not an ancillary benefit."

Thus, to be a "retirement-type subsidy," the COLA must first be a "retirement-type benefit." But the COLA cannot be a "retirement-type benefit" because it is neither "a distribution alternative" nor "the payment of any other benefit." As *Hickey* held, 980 F.2d at 468, the COLA is not a separate benefit; it is a percentage increase in the annuity to which the participant is entitled at normal retirement age. It cannot even be calculated apart from the normal retirement benefit.

In addition, the COLA cannot be a "retirement-type subsidy" because it has no "excess" actuarial value when compared to the normal retirement annuity. The COLA is limited to a maximum of 3% of the annuity that it increases. In short, the COLA is an increase in the accrued benefit, not a more valuable alternative to the accrued benefit.

V. THE PLAN IGNORES THE IRS'S POSITION THAT AUTOMATIC COLAS ARE ACCRUED BENEFITS.

Not only are the Circuits in full accord with the Seventh Circuit's decision, but the Internal Revenue Service has long held that automatic pension COLAs earned during employment are accrued benefits and their value must be included in lump-sum benefit distributions. Even though the views of the IRS, the expert agency charged with enforcing ERISA, are entitled to considerable weight in determining whether particular types of benefits are accrued benefits, *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989), the Plan completely ignores them.

In 1975, the year after ERISA was enacted, the IRS published guidelines for implementing the new statute. The guidelines provide that even if a defined benefit plan's terms give a COLA only to participants who remain in service until normal retirement age, the COLA must also be provided to participants who terminate service prior to that age because it is part of the participants' accrued benefit:

> Q. A defined benefit plan subject to the minimum vesting standards of section 411 of the Code provides that normal retirement benefits are to be adjusted by a cost-of-living index after the normal retirement age. The plan does not specifically provide that participants who separate from service prior to the normal retirement age will have their vested benefits adjusted for changes in the

> cost of living after the participants attain normal retirement age. Does the plan meet the minimum vesting requirements of section 411?
>
> A. No. If the plan provides that the normal retirement benefit is adjusted for changes in the cost-of-living occurring after normal retirement age, it must also provide that the vested benefits of participants who separate from service prior to the normal retirement age will be similarly adjusted because the minimum accrued benefits required in section 411(b)(1) reflect the form as well as the amount of the normal retirement benefits. For example, if a plan allows early retirement but without cost-of-living adjustments until normal retirement age, then the cost-of-living adjustment for terminated vested participants need only reflect changes in the cost-of-living index that occur after the terminated vested participants attain the normal retirement age.

IRS Announcement 75-110; 1975 IRB LEXIS 32 at *41-42; 1975-43 I.R.B. 20 (Oct. 28, 1975).

In 1995 the IRS instructed that:

> For purposes of calculating a single-sum distribution of a participant's benefit, COLA increases in the dollar limitation and the compensation limitation must not be anticipated. *Where a plan formula provides that participant's benefit is increased each year by a COLA which is a function of the Consumer*

> *Price Index (CPI), a participant receiving a benefit in the form of a single sum must receive projections of the CPI increases (based on reasonable actuarial assumptions) as part of a single sum*, but only to the extent that the single sum does not exceed the actuarial present value of the lesser of the current dollar limitation or current compensation limitation[8] applicable to the participant.

IRS Announcement 95-99, *reprinted* in LEXIS, 95 TNT 229-3, Tax Analysts, Tax Notes Today, § III(B) (emphasis added).[9]

From at least 1994, the IRS has advised pension practitioners that the value of an automatic COLA must be included in lump-sum distributions:

> The plan ... provides for annual post-retirement cost-of-living increases based on the National Cost-of-Living index, but not to exceed 3% in any year. The plan states that for lump sum determination, it is assumed that there would be no increase in the COL index.

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[8] The terms "current dollar limitation" and "current compensation limitation" refer to federal tax law limits on the maximum amount of an individual's annual pension benefits and are irrelevant here.

[9] The IRS Manual adopts this same position with respect to COLAs. Internal Revenue Manual, Cost of Living Adjustments (COLAs), § 4.72.6.3.1(6)(A) (12-01-2002), available at http://www.irs.gov/irm/part4/ch52s08.html.

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> Subject to Section 415 . . . , an automatic cost-of-living provision is an integral part of the participant's accrued benefit and, therefore, must be taken into account when determining amounts payable under optional forms of benefit. The assumption that there will be no increase in the COL index in determining the lump sum would not be reasonable and, therefore, would result in the impermissible forfeiture of accrued benefits under section 411.

1994 Enrolled Actuaries Meeting, Questions to IRS/ Treasury and Summary of Their Responses (March 1994) at 1994-39.

VI. THE SEVENTH CIRCUIT'S DECISION WILL HAVE NO IMPACT ON THE FUNDING AND TERMINATION OF PENSION PLANS, INCLUDING THE ROHM AND HAAS PLAN.

The Plan's depiction of the supposedly dire consequences of the Seventh Circuit's decision for the pension system in the United States has no basis in reality.

First, the Seventh Circuit followed *Hickey*, which was decided in 1992. *Hickey* has not been mentioned as a factor in the country's pension problems. The Plan cites no pension fund insolvency which involved a COLA. Moreover, the IRS advised plans as early as 1975 that lump-sum distributions must include a

COLA's discounted value. This Plan, and any other plan providing a COLA, knew or certainly should have known that the COLA was an accrued benefit under ERISA and could have decided not to provide it or to eliminate it prospectively.

Second, because the lump-sum distribution must be the actuarial equivalent of the retirement annuity, the financial cost to plans is the same whether a participant receives the COLA as part of his accrued benefit beginning at age 65 or earlier through a discounted lump sum. Therefore, decisions by participants to take their pension benefits earlier as discounted lump sums impose no financial burdens on plans. The lack of a financial burden is demonstrated by the fact that after the Seventh Circuit denied rehearing in this case, Rohm and Haas stated that the Plan has sufficient funds to pay the actuarial value of the COLA to the class of retiree lump-sum recipients.[10]

Third, almost no pension plans governed by ERISA provide automatic COLAs. *See* Lowman, Group Variable Annuity Pension Plan, Society of Actuaries, Pension Section News 5, 6 (Mar. 2004).[11] *See also* J. Langbein & B. Wolk, *Pension & Employee Benefit Law* 157 (3d ed. 2000) (as of 1995 only 3% of

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[10] *Rohm and Haas Announces One-Time Non-Cash Pension Charge and Third Quarter 2007 Outlook*, Rohm and Haas, Oct. 15, 2007 (http://www.rohmhaas.com/wcm/news/index.page?).

[11] Available at http://www.soa.org/library/unclassified/psn0403.pdf.

participants in plans governed by ERISA were provided automatic COLAs). Indeed, despite making inquiries of her colleagues, Rohm and Haas's director of corporate employee benefits had never even heard of another plan providing an automatic COLA. Coyle Dep. 33-34.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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